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DISCUSSION

The Course of True Law Never Did Run Smooth

Aesthetic and Eschatological Themes in Martti
Koskenniemi's FATU

MATTHIAS GOLDMANN — 24 November, 2014



Martti Koskenniemi's "From Apology to Utopia" remains an enigma. Since it appeared 25 years ago, generations of lawyers have come to adore it. The fan group even comprises a considerable number of classical international lawyers, those who cherish international law as a solid empire of formal reasoning that might contain power and repeal injustice. On the face of it, the message of FATU should be pure heresy to them. But why do they love it so much?

I think they love it for its beauty. We do not necessarily adore literary texts because they tell us what we want to hear. But because they say something important in the most appealing fusion of form and function; and because they say it so appealingly, it also becomes important what they have to say. We love Shakespeare's *Romeo and Juliet*, not only because it tells a story of love and fate, but because it tells it so well, and by doing so, Shakespeare makes us realize how important love and fate indeed are in our lives.

The play written by Koskeniemi takes our everyday experience as lawyers to the highest aesthetic level. It begins with the title. *Apology and Utopia* stand for the tragic tension inherent in the law. The gap between them is as broad as the distance between the letters A and U in the alphabet. If you turn the "U" on its head, it looks like the Omega in the Greek alphabet, which makes the distance between the two letters appear even larger, while at the same time evoking eschatological associations. The title thus reveals the main message: *Apology and Utopia* had to get entangled in a tragic relationship of affection and rejection, they could not simply live together happily ever after.

Another element adding to *FATU*'s aesthetics is the perspective. We love *Romeo and Juliet* not only because their relationship fails tragically. We love the play because we are the spectators and we understand the circumstances of their relationship which lead to disaster. Conventional textbooks of international law treat us as participants. They try to assuage our concern about global justice with doctrine which alleges the certainty of a script. In other law books, we are the poor actors that need to study their part, not to question it. All ends well. *FATU*, by contrast, articulates our concerns about justice. In *FATU*, Koskeniemi makes us the

spectator, and law is the poor player whom we watch as he struts and frets its hour upon the stage. Nothing ends well. Law fails tragically. And like in Shakespeare's play, we understand that the archaic idea of law as a means for the realization of justice had to fail because of law's structural bias.

FATU's second edition has a particularly dramatic ending. Shattered as our trust in international law is after 616 pages of tragic failure, Koskenniemi seemingly rehabilitates it in the very last moment, on the penultimate page, when he produces that little green twig named "culture of formalism". "Formalism" evokes the old idea about law as a solid empire of reason where judgment and justice converge to a mighty stream. The aesthetics of FATU's finale – not its content – suggest a rehabilitation of that archaic understanding of law as the holy scripture of a secular eschatology. I tender into evidence what Koskenniemi's interpreters make of the "culture of formalism": it ranges from a kind of virtue ethics via an update of Kelsen's programme to a Weberian project,

I doubt whether an idea of the law that remains intact only in its aesthetic dimension holds much promise for the challenges of a pluralistic, post-modern, secular environment. I therefore suggest an alternative finale which dispenses with any, if only aesthetic, allusion to law as an impersonal, detached idea of justice, but understands it as a social practice enabling democracy.

Certainly, Koskenniemi deserves credit for bringing it to the attention of a large, law-loving audience that much of international law reconfirms, rather than remedies, cleavages between North and South, between the haves and the have-nots. But that should not mislead us to think that

law was an inadequate means to bring about justice. Rather, law enables democracy as probably the best way of achieving justice by framing the respective institutions and procedures. This aspect of law is missing in FATU. Certainly, a legal framework alone does not render an institution or a procedure democratic. They also need to meet the requirements of democratic governance, such as fairness, representation, and transparency. To put it otherwise: We cannot expect just decisions to emerge from undemocratic institutions or unfair procedures. But if we combine law with global democracy, we find an escape route that leads us from the spectator's box back to center stage, a third way which overcomes the archaic idea of law-as-justice without falling into resignation.

So all's well? Not quite. Right now, global democracy remains a distant hope. Problems abound: practically, theoretically, and – aesthetically. Practically, international institutions still exercise public authority without appropriate structures ensuring democracy, not to speak of enterprises which escape from democracy's reach. Theoretically, global democracy seems to require a fundamental reconceptualization of an idea developed for the nation state.

At least as serious is the, third, aesthetic deficit: The idea of law as a prerequisite for democracy is not nearly as beautiful as the archaic idea of the law. The latter tells a story of love, justice and destiny. Modern democracy tells a story of campaigns, compromise and bureaucracy. At a time of pending humanitarian, ecological or economic disasters, should we really worry about the intricacies of qualified majorities? About *amicus curiae* rights before international tribunals?

We appear to be insatiably attracted to the idea of law as the eschaton that celebrates law as the expression of metaphysical justice, emanating from the grace of God. The reality of democratic practice strips law of its beauty – as well as its eschatological promise. Instead of love and fate, we get lost in arguments about speaking times. In democracy, the course of true law never did run smooth. Only pale reflections remain of the archaic idea of justice. Quite tellingly, to the extent that modern democracies try to inspire our aesthetic imaginary, they emulate royal ceremonial, as if they realized the aesthetic deficit: Republican presidents reside in former royal palaces, and their swearing-in ceremonies put icing over the rifts caused by the preceding electoral campaign. At the German constitutional court, they wear gowns from 15th-century Florence. However, in times of crisis, we find little comfort in such aesthetics; little that would assuage our doubts and reaffirm our belief that there is justice in the present order.

FATU ultimately reconfirms the archaic idea of the law on an aesthetic level, even though it does not vindicate its message. I suppose that this is an important reason for our continued fascination with FATU. In our minds we want to cling to that old story about law as a means of hope and redemption, and we cling to it at the sight of the smallest green twig. We have not yet cut off the head of the old king because the new king does not enter stage with equal splendor. So we beat on, boats against the current, borne back ceaselessly into the past.

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